EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote hearing not objected to by the parties. The form of remote hearing was by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same.”

Claimant		**Respondent**
Raimundo Cardozo	**v**	**Dolphin Movers Limited**

Heard at: Watford by video (CVP) **On**: 12 and 13 October 2021

Before: Employment Judge Bloch QC, Ms M Harris and Mr P Miller

Appearances

For the Claimant: Mr J Sanghera
For the Respondent: No appearance

JUDGMENT

1. The claimant was unfairly dismissed and is awarded the sum of £2,821. comprising a basic award of £2,421.00 and loss of statutory rights: £400.

2. The claimant is entitled to the sum of £4580.54 in respect of unauthorised deductions from his wages.

3. The total award is accordingly £7,401.54

REASONS

1. The issues in this case were straightforward, namely:

   1.1 Was the claimant unfairly dismissed by reason of redundancy contrary to s.98 of the Employment Rights Act 1996 (“ERA”);

   1.2 Did the claimant suffer unlawful deductions in respect of his salary;

1.3 Is the claimant entitled to a protective award under s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992?

2. The respondent did not appear. The last that was heard from the respondent was by email on 30 June 2021. Since then the respondent has not engaged with these proceedings and in particular has not complied with any orders of the tribunal or requests by the tribunal or the claimant.

3. The facts of the matter are set out in the claimant's witness statement.

4. The claimant was employed by the respondent as a general manager from 3 January 2017 until he was dismissed on 10 June 2020 by reason of redundancy. The respondent (as its name indicates) carried on business primarily as movers of goods, mainly household goods from one part of the country to the other. In addition to this general removal business it also ran a general cargo business which involved receiving cargo, (mainly sport goods) in containers and where necessary storing them in its warehouse.

5. On 25 April 2019 the claimant received a letter from the respondent confirming that his salary wold be increased to £37,000 with effect from 1 May 2019.

6. On 30 March 2020 the claimant received a letter from a director of the respondent which stated that he had been placed on furlough due to the pandemic. The following day, 1 April 2020, the claimant received a call from the sales director stating that he was to continue working as usual but from home. The claimant therefore continued to attend to calls and quote for jobs as requested.

7. On 3 April 2020 the claimant replied accepting that he would be happy to be classified as a furlough worker and he enquired about when he would receive his wages. At that time, he did not know how furlough worked but believed that his wages would be reduced to 80% although he had not formally agreed to this.

8. On 16 April 2020 the claimant received a further letter from the respondent. This letter explained what furlough was and advised that not withstanding that the claimant was being paid only 80% of salary he should continue working a usual, otherwise his employment would be terminated and he would be made redundant.

9. On 15 May 2020 the claimant received his furlough payment for March and April and on 15 June he was paid his normal salary from 1 to 16 March 2020. However, it later transpired that those payments had been incorrectly paid. In particular his furlough rate had been paid incorrectly.

10. On 10 June 2020 the claimant received an email from the respondent stating that due to current circumstances his employment would terminate with effect from 31 July 2020. This was followed by a letter - but that letter was silent as to redundancy pay notwithstanding that this was clearly a redundancy situation.

11. On 16 June the claimant appealed against his termination as he believed that it had been unfair and he reiterated that he had been told to continue to work from 1 April 2020. There had been no meeting to discuss termination nor was there any form of collective consultation. The claimant added in his witness statement: “I believe more than 20 people at the respondent were made redundant”. I shall return to this below.

12. On 2 September 2020 the claimant received his July salary and was told to sign and return a form which he did not do as he raised concerns that the payment was incorrect. He should not have been paid 80% given that he had continued working. Further, he said that the furlough rate had been calculated incorrectly.

13. On 18 September the respondent informed the claimant that the managing director was away and could not answer his payment queries until his return and asked for an extension of time up to 30 September 2020.

14. The claimant’s queries were not answered and he received £5,500 as a final payment on 21 September 2020. That payment reflected his outstanding holiday pay and normal salary for working throughout July. Although the claimant claimed redundancy pay, that was, according to the claimant, paid incorrectly, the claimant believing that the payment did not reflect the total amount of money owed to him.

15. In the course of his evidence the claimant told the tribunal that there were 10 people working in the office and 14 working in the warehouse. He was absolutely sure of the number working in the office (where he worked) but claimed also to know that there were 14 people working in the warehouse.

16. However, the claimant also told the tribunal that of the 10 office workers (6 being the most senior members of staff) were retained by the claimant so that accordingly only 4 office workers were dismissed by reason of redundancy at the time of his dismissal. Together with the 14 members of the warehouse who were made redundant around about the same time, that meant that there were 18 people who were made redundant at the relevant time.

17. In re-examination Mr Sanghera boldly revisited this part of the claimant’s evidence and he stated that there were 4 from the office who were made redundant and that it could be that it was 14 in the warehouse who were made redundant - but it could also be 16 in the warehouse who were made redundant, giving the requisite total of 20 required to engage the duty of collective consultation.

18. The tribunal had no hesitation in accepting that there were 18 members of staff who were made redundant at the time of the claimant’s dismissal and not 20.

19. The relevant statutory provisions are well known. Under s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (1):

> "Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriately representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals."

20. Under s.94 of the Employment Rights Act 1996: "An employee has a right not to be unfairly dismissed".

21. And s.98(1) provides:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> …
>
> (2) A reason falls within this subsection if it—
>
> (c) is that the employee was redundant;
>
> ….
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

Discussion

22. Unfair dismissal

    22.1 It appeared to be common ground that the reason for the claimant's dismissal was redundancy. The only question was whether the employer, the respondent, acted reasonably in treating redundancy as a sufficient reason for dismissal. The answer is plainly no, given that the respondent adopted no procedure whatsoever in summarily dismissing the claimant. There was no warning and no consultation on either an individual or a collective basis. Accordingly, the dismissal was unfair.

23. Protective award

23.1 Given the tribunal's unanimous finding that there were 18 personnel who were dismissed around about the time of the claimant's dismissal by reason of redundancy, s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 is simply not engaged. As set out above the tribunal rejected that part of the evidence of the claimant where he indicated that the number of staff who may have been made redundant was or could have been 20.

24. Unlawful deductions

24.1 As set out in the claimant's revised schedule of loss the claimant and explained by Mr Sanghera to the tribunal, there were claims over two periods in March of 2020.

24.1.1 For the period 1 March to 16 March 2020 the claimant should have been paid two weeks at £711.54 (full pay based on an annual pay of £37,000.) namely £1,423.08;

24.1.2 for the period 17 March to 30 March when the claimant was on furlough he should have received two weeks x £711.54 x 80%, namely £1,138.46.

24.1.3 Instead of these two sums the claimant was paid the sum of £1,800 leaving a balance of £761.54 unpaid.

24.2 In respect of the period April to June 2020 the claimant received furlough pay despite continuing to work from home and only received £1,600 gross per month whereas this should have been £3,083.33. He therefore claimed the difference in the gross sum which was £1,483.33 gross per month, equivalent to net pay of £1,273 per month x three months = £3,819. Accordingly, the total wages unpaid were £4,580.54.

25. Remedy

25.1 In respect of his claim for unfair dismissal by the claimant's revised schedule, he made clear that he claimed no loss by way of compensation since he had during the period earned money as a self-employed person and suffered no loss. Accordingly, he was entitled only to a basic award of £2,421 (three years x 1.5 x cap of £538). The tribunal also awarded £400 in respect of loss of statutory rights. The total claim awarded by the tribunal was accordingly £7,401.54

26. At the outset of the hearing Mr Sanghera, on behalf of the claimant, applied to strike out the respondent's defence under Rule 37 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 namely that the defence had no reasonable prospect of success, the manner in which the proceedings had been conducted on behalf of the respondent had been unreasonable, there had been non-compliance with orders of the tribunal and the case had not been actively pursued by the respondent. He asked the tribunal to exercise its discretion to strike out the defence.

27. All of the bases appear to the tribunal to be well-founded. However, given that the claimant was ready to proceed with the presentation of the claim and given that liability and remedy appeared to be inextricably interlinked, it was not clear to the tribunal that any substantial time or cost would be saved by striking out the defence. The tribunal accordingly reserved its decision to the end of the hearing.

28. The claimant has succeeded in its claim to the extent referred to above and it therefore appears inappropriate to strike out the defence. That said, but for the factors referred to immediately above, the tribunal would (unanimously) have struck out the defence under Rule 37(1)(a)(b)(c) and (d).

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Employment Judge Bloch QC

Date: 8 November 2021

Sent to the parties on: 3/12/2021

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For the Tribunal Office